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TABLE OF CASES.

In the Supreme Court of the United States

OCTOBER TERM, 1959.

No.

THOMAS MICHALIC,

Petitioner,

vs.

CLEVELAND TANKERS INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

COUNTER STATEMENT OF QUESTION PRESENTED.

Whether in an action for damages under the Jones Act, where there is no reasonable evidence as to negligence, unseaworthiness and proximate cause, the Trial Court is justified in taking the case from the jury.

COUNTER STATEMENT OF FACTS.

The petitioner's statement of facts is, in the main, accurate. It should be pointed out, however, that the injured party by his own testimony removed the issues as to lack of proper illumination and lack of working space from the case (pp. 24, 28) leaving for determination by the Court as to whether there was any evidence from which a jury could find that the negligence of the defendant, or the unseaworthiness of the vessel, in any way contributed to the slipping of the wrench and the injury sustained to the plaintiff's foot.

Inasmuch as, in the consideration of the question presented by the petition, the proofs presented by the plain-

tiff must be considered to be true and in their most favorable light, no useful purpose would be served by a detailed reference to the facts, at this juncture.

REASONS FOR DENYING THE PETITION.

1. The decisions below are in conformance with the rule, often announced by this Court, that in a Jones Act case the plaintiff must produce some reasonable evidence to prove or permit a justifiable inference of negligence, unseaworthiness and proximate cause and that it rests with the Trial Court to determine whether that evidence exists. The decision below does not conflict with any of the decisions of this Court.

The facts in this case have already received the thoughtful consideration of the two lower Courts. The petitioner seeks a third review by this Court on the ground that the direction of a verdict for the respondent at the conclusion of all of the evidence constituted a usurpation of the petitioner's constitutional right to a trial by jury. It can hardly be reasonably urged that the direction of a verdict constitutes an abridgement of the right to a jury trial, *per se*. What the petitioner probably means to contend is that the action of the trial court, as affirmed by the Court below, constituted an unwarranted invasion of the function of the jury as the trier of the facts.

In relying upon *Rogers v. Missouri*, 352 U. S. 500, and *Ferguson v. Moore-McCormack*, 352 U. S. 521, the petitioner has seen fit to disregard the language appearing in both decisions which leaves undisturbed the obligation on the part of the plaintiff to produce some evidence to prove or permit a justifiable inference of fault upon which liability may be imposed. In *Rogers v. Missouri*, *supra*, this Court said (pp. 506, 507):

"Under this statute the test of a jury case is simply whether the proofs justify *with reason* the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also, *with reason*, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, *with reason*, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. * * *" (Emphasis supplied.)

At three places in the above quoted portion of the opinion there is reference to the requirement that there must be a "reasonable" basis for the finding that negligence exists and that it played some part in the injury or death. That requirement is not satisfied by proof that is not "reasonable" and it must necessarily rest with the Court and the Court alone to evaluate the proof in that regard. The above cited decisions are undoubted authority for the proposition that it does not rest with the trial court to make a quantitative analysis of the proof, but there is no language in them, or in the innumerable decisions to which the petitioner refers, that deprives the trial court of the initial right to determine whether reasonable minds could or could not disagree. That has been and still is the time honored test, and, unless it is met, the jury has no function to perform.

This case does not present a situation requiring the intervention of this Court to determine whether there was *sufficient* evidence to send the case to the jury. The two Courts below, after accepting the plaintiff's proofs as true, and in their most favorable light, concluded that there was

no evidence of fault and proximate cause. Upon that determination the case ceased to be one for the jury, and, unless the right to make that initial determination by the trial court is preserved inviolate, the simple expedient of filing a suit and submitting proof would require the submission of a case to a jury. This and other Courts have zealously guarded the rights of injured workmen to have their causes submitted to a jury, but they have not permitted an eroding away of the requirement that there be something for the jury to determine.

The trial court considered the issues as to negligence, unseaworthiness and proximate cause and found an absence of proof as to all three. An affirmance, *per curiam*, by the Circuit Court of Appeals, followed.

The proper function of the trial court in determining whether a case under the Federal Employers' Liability Act should or should not be submitted to a jury is clearly set forth in a concurring opinion of this Court in *Wilkinson v. McCarthy*, 336 U. S. 53, at pages 64 and 65. That language applies with equal force, to a case under the Jones Act.

2. The petition does not present a question of great national importance, nor the construction of a statute. It involves a controversy between private litigants with the sole issue the evaluation of evidence by this Court.

We respectfully suggest that this case does not present issues which justify the exercise by this Court of its certiorari jurisdiction. That jurisdiction, this Court has said "is to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision." *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U. S. 251, 258. Those important considerations do not exist here. Stripped of all of the non-essentials, this is but another one of the hundreds

of cases in which the defeated party in the Circuit Court of Appeals seeks another hearing. It is common knowledge that the docket of this Court is crowded with cases involving questions of national importance. No sound reason has been advanced for the further overburdening of the Court with a case that is a prototype of so many others and that does not contain a single factor which requires appellate review.

CONCLUSION.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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